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288-345—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 697

CAESAR BOTTONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 698

SEYMOUR SALB, PETITIONER

v.

UNITED STATES OF AMERICA

No. 699

NATHAN SHARFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 365 F. 2d 389.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1966. Petitions for rehearing were denied on September 20, 1966. The petitions for writs of certiorari were filed on October 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether papers outlining manufacturing processes are included within the statute (18 U.S.C. 2314, 2315) punishing the interstate transportation of stolen "goods".

2. Whether there was sufficient evidence to show that the goods transported had a value of at least $5,000 and whether the jury was properly instructed on this element.

3. Whether the evidence was sufficient to support the conviction of petitioner Bottone.

4. Whether the government was properly allowed to use a deposition and memoranda of statements made by petitioner Bottone in a civil action.

5. Whether the trial court sentenced petitioners properly.

6. Whether the trial judge could properly delay the sentencing of petitioner's codefendants.

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more,

knowing the same to have been stolen, converted or taken by fraud; * * *.

* * * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioners and others were convicted in the United States District Court for the Southern District of New York of conspiring to steal and transport stolen drug cultures and documents of a value of more than $5,000 (count 10). Each was also convicted of substantive offenses, including count 8, charging transportation of cultures and documents on April 16, 1961, and count 9, charging transportation of cultures alone on September 15, 1961.[1] On January 20, 1966, each was sentenced to imprisonment for two years on each count upon which he was convicted, the sentences to run concurrently.

The existence of a scheme to steal from the Lederle Laboratories microorganisms used in the production of three antibiotics and a steroid, and instructions for their manufacture, is not challenged here, although petitioner Bottone claims the evidence failed to show that he had guilty knowldege. Briefly, the evidence shows that in early 1958, petitioners Sharff and Salb, partners in Biorganic Laboratories, agreed to pay Sidney Fox, a Lederle chemist, $10 per gram for all the tetracycline (TC) that he could steal from his

[1] Petitioners Sharff and Salb were also convicted on count 1 charging the interstate transportation of drugs and cultures on November 11, 1959.

company. During the next six months, Fox delivered stolen TC to Biorganic (R. 301–313), and, subsequently, the microorganisms and written procedures necessary for the production of TC (R. 320–330). Petitioner Bottone, the owner of Pan-Med Pharmaceutical in New Jersey, sold the TC in Italy on behalf of Biorganic at $12 per gram (R. 415–416). Fox also stole a newly discovered antibiotic, demethychlortetracycline (DMTC), and delivered it to Sharff (R. 313–317).

Prior to Fox's resignation from Lederle in September 1959, Sharff and Salb inquired whether he had sufficient Lederle cultures and documents for future use (R. 359–360). In November 1959, Fox was paid $5000 for delivering to Salb a chlortetracycline (CTC) culture and a procedure abstracted from Lederle reports (R. 361–366). Fox subsequently attempted to sell stolen Lederle cultures and processes to firms other than Biorganic (R. 370–376), and Sharff and Salb unsuccessfully attempted to obtain such materials from another Lederle employee (R. 774–782).

In the summer of 1960, Fox, with John Cancelarich, a Lederle chemical engineer, and Leonard Fine, joined together in a business whose primary purpose was the theft and sale of Lederle products to foreign drug firms (R. 389–391, 562–563, 829–831). Cancelarich brought Lederle documents containing its current procedures for preparing the three antibiotics to Fox. The papers were then copied, either by photocopy, microfilm or typewriter (R. 389–394, 834–843). Cancelarich also brought Fox stolen samples

of Lederle's current DMTC and CTC cultures (R. 833–843). At the end of 1960, Fox turned over his collection of stolen Lederle cultures to Cancelarich and his stolen documents to Fine (R. 404, 410, 843).

In April 14, 1960, Cancelarich and Fine met with a group consisting of petitioners and Elio Salvetti, who was about to purchase an interest in Ankermann Italiana, an Italian drug firm. Cancelarich told them he had now had possession of the documents and cultures that Fox and he had taken from Lederle (R. 675–681, 860, 1174–1175).[2] As a result of the meeting, Sharff and Salb agreed to hire Cancelarich to work for Ankermann. Two days later, when Cancelarich carried an attaché case containing stolen Lederle cultures and documents to an airport bound for Italy, Bottone drove him there and bought his ticket. At the end of May, Bottone also took Fine to the airport and supplied him with a ticket to Italy. At that time, Fine informed Bottone that he was carrying antibiotic cultures and other items to Cancelarich in Italy (R. 1511–1515).[3]

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[2] The court of appeals found that it was not proved that Bottone was present at the April 14 meeting when Cancelarich spoke about the stolen collection. Cancelarich testified that Bottone was present at this meeting when he told the participants that he had access to the latest Lederle production cultures (R. 859–860). On the other hand, Fine said he did not know when Bottone joined the meeting (R. 1507).

[3] Bottone had previously introduced Cancelarich to a representative of another Italian drug firm which agreed to buy a DMCTC culture and document for $50,000. Bottone and Cancelarich agreed to divide this amount (R. 873–876). Bottone sent this firm an empty Lederle package carton for DMCTC (R. 1516–1521).

In September 1961, Bottone carried CTC cultures from New York to Helmuth Wawretschek at the Ankermann plant in Italy. He told Wawretschek that the cultures were from Sharff (R. 695). Wawretschek testified on direct examination that Bottone had told him the package contained strains which had come from Fine (R. 695–696).[4]

ARGUMENT

1. The documents, describing Lederle's manufacturing processes, that were transported in interstate and foreign commerce were not original papers but copies made by Fox and Cancelarich; and petitioners argue (No. 697, Pet. 24–30; No. 699, Pet. 12–14) that copies are excluded from the coverage of the statute. However, an examination of the statute and its history makes clear that "goods" includes photocopies, microfilms and other copies of stolen papers.

(*a*) Section 2314 of Title 18 (*supra*, p. 2) makes it a crime to transport in interstate or foreign commerce "any goods, wares, merchandise, securities or money," of the value of $5,000 or more, knowing them to have been stolen, converted or taken by fraud. The purpose of the statute was to extend the motor-vehicle theft act "to all goods, wares or merchandise" of the value specified (S. Rep. No. 538, 73d Cong., 2d Sess., p. 1), including papers (see *United States* v. *Seagraves*, 265 F. 2d 876 (C.A. 3)). This purpose would be defeated by a construction that excluded

[4] Petitioner Bottone contends that Cancelarich disavowed this testimony on cross-examination, but we do not so read his testimony (R. 746–750).

copies of stolen papers, since what is valuable is the information on the paper, not the physical document. As the court of appeals pointed out (No. 697, Pet. App. A 8):

> * * * [W]hen the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it.

(*b*) As the court of appeals also noted, since petitioners received concurrent sentences under counts 9 and 10, their convictions are valid even if Section 2314 does not reach documentary copies. See *Lawn* v. *United States*, 355 U.S. 339.[5]

2. In seeking to prove that the stolen goods had a value of more than $5,000, the government showed that in April 1960 Ankermann Italiana had agreed to pay Shariff and Salb $240,000 for TC, DMCTC and CTC microorganisms and procedures (R. 669–673) and that a Milan pharmaceutical firm had agreed to pay Bottone and Cancelarich $50,000 for the Lederle DMCTC culture and procedure (R. 873–876). There was other evidence of payments for Lederle cultures

[5] Count 9 charged the transportation of cultures only.

substantially in excess of the jurisdictional amount (R. 366–376, 401–403, 429–430, 840–841); proof of Lederle's costs in developing its antibiotic (Ex. 178); and expert testimony that the information in one of the documents "could be of immediate value to someone wishing to start on an equal footing with American Cyanamid in the manufacture of DMCTC" (R. 1803–1804). The court instructed (R. 2793–2794):

> You may determine the value of these goods under each count based on money that was paid for these goods at or about the date of the alleged commission of the crime, whether they were transactions involving the very articles charged in the indictment or similar transactions involving the same. You may also consider agreements that may have been made for the sale of such cultures or documents, even though they were not consummated. And finally, you may consider the cost to American Cyanamid for the development of the various organisms and the documents detailing the manufacturing procedures. In this connection, you may take into consideration the secrecy attendant upon this work and desires of other people to obtain the results of this work.

This instruction provided the jury a reasonable method for determining the value of the stolen items. See *United States* v. *Lester*, 282 F. 2d 750, 755 (C.A. 3), certiorari denied, 364 U.S. 937. Petitioners did not except to this instruction, and we submit that their contention that the government's evidence was insufficient to prove the $5,000 amount required by 18 U.S.C. 2314 (No. 699, Pet. 9–12; No. 697, Pet. 42–44,

50–54) is without substance. *Abbott* v. *United States*, 239 F. 2d 310 (C.A. 5), does not support petitioners. [redacted] It held merely that the proof of value was not sufficient because the "government never established either that there was a market for the sale, purchase, and trade in prints of geophysical maps or a market value" (239 F. 2d at 312). Here the existence of a market was amply shown. Nor is it material whether the stolen cultures were viable and productive at the time of transportation. The value specified by the statute is determined as of the time and place of theft, rather than of receipt or transportation. *Tippett* v. *United States*, 353 F. 2d 335 (C.A. 4), certiorari denied, 383 U.S. 908.

3. Petitioner Bottone's challenge to the sufficiency of the evidence does not raise a substantial issue (No. 697, Pet. 46–50). As the court below found, the total circumstances of his participation—the cable he sent when Biorganic was trying to stop Fox from selling the stolen materials independently (R. 380–384), his participation in Ankermann Italiana, his sale of the culture and documents to MIBA, his transportation of Cancelarich and Fine to the airport when they were carrying stolen materials, his own trip to Italy with a CTC culture—supported an inference of guilty knowledge.

4. The government in its case in chief used portions of a lengthy deposition taken from petitioner Bottone in a civil action brought against him by Merck & Company (R. 2110–2125). It also cross-examined Bottone on the basis of statements (labeled

"memoranda", but transcribed in the same manner as depositions (R. 2366–2367)) made after Bottone had permitted a consent judgment to be entered against him by Merck. In order to reduce the size of the money judgment, Bottone had agreed to make a complete disclosure to Merck about specific subjects (R. 2406–2417). Bottone's lawyer was present at some but not all of the sessions when the statements were taken (R. 2415). Counsel who examined Bottone was a member of the law firm which also represented American Cyanamid, the present owner of Lederle (R. 2405). On cross-examination of Bottone by counsel for petitioner Salb, the court refused to allow questions as to whether counsel for Merck had tried to induce Bottone to obtain evidence against Biorganic (R. 2419–2422). At the trial, petitioner objected to the use of the deposition on the ground that he had been compelled to incriminate himself, the deposition having been given under subpoena, and that the statements made therein were not admissions (R. 2003–2004, 2008–2008a). He objected to the "memoranda" on the ground that he had not been represented by counsel (R. 2366–2368).

Petitioner Bottone argues in effect (Pet. No. 697, pp. 31–37) that all of the statements in these various documents were inadmissible, on the ground (not urged at the trial level) that it is an inescapable inference that the attorney for Merck was surreptitiously acting as an agent for the government after the investigation had focused on petitioner. No such inference is in fact justified. There is no indication whatsoever that in proceeding civilly against peti-

tioner, and in questioning him in connection with that proceeding, Merck and its attorneys had any purpose other than to protect the firm's private interests.

5. The record does not support the contention that petitioners received harsher sentences because they pleaded not guilty and stood trial (Pet. No. 698). The trial court first considered the sentences of the three petitioners. After hearing the pleas of counsel and after allocution, the court addressed petitioners as follows (R. 2873):

> You were there to move it on its way and in some instances even encouraged the other defendants who pleaded guilty to engage in the acts that they were engaged in.
>
> I think I have to be a Solomon to distinguish between the culpability of the three defendants to whom I am now talking, Mr. Sharff, obviously you were the head of this. Your manipulations were like somebody moving chessmen around a board. The string of exhibits and correspondence between you and Cancelarich show that.
>
> Mr. Salb, you were part and parcel of it and you knew that it was going on, and so did you, Dr. Bottone, and that midnight ride from Milan to London is one of the unexplained acts in this case.

The Court then sentenced each of petitioners to imprisonment for two years, noting that society had a right to be protected from them and from "others of like mind and like intelligence who may engage in this type of activity" (R. 2873–2874).

The court then considered the sentences to be imposed on the defendants who had pleaded guilty,

Sidney Fox, John Cancelarich, Leonard Fine and Joseph Gerace. The government told the court that each of them had cooperated with the government, pointing out that the government would not have heard of the crimes except for the information furnished by Gerace (R. 2876–2877, 2822, 2886–2887, 2891). Their lawyers argued that they should not be imprisoned because they had already been punished sufficiently (R. 2879, 2886, 2890). The court imposed a suspended sentence on Gerace because he had volunteered information and because he had had only a small role in the conspiracy (R. 2896–2897). The court rejected the pleas for probation on behalf of the others, saying in part: "Pleas are always made for leniency where defendants plead guilty and cooperate with the government" (R. 2897). The court then imposed sentences of six months' imprisonment.

On this record, which shows that the court considered the three petitioners the tempters and the ringleaders,* there is no reason for review of the trial court's exercise of discretion with respect to the sentences imposed. This case is not like *United States v. Wiley*, 278 F. 2d 500, 504 (C.A. 7), where the court of appeals found "that the punishment imposed * * * was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted." Wiley, a minor defend-

*It is true that the court of appeals called Fox and Cancelarich "the chief culprits," but that was a reference to their role as the principal actors in the actual thefts from Lederle, rather than a suggestion that they were the kingpins in the conspiracy. This is clear from the court's subsequent statement that the "serious crimes charged against the appellants, Salb, Sharff, and Bottone were on the receiving end."

ant without a criminal record, had been sentenced to three years' imprisonment while the ringleader with a prior record received a sentence of only two years.

6. The contention that petitioners were denied a fair trial because imposition of the sentences of petitioners' codefendants was delayed until the conclusion of petitioners' trial (No. 699, Pet. 14–17) was not raised in the court of appeals. It is, therefore, not reviewable by this Court in the absence of exceptional circumstances. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. There are none here. If petitioners believed that any testimony was motivated by hope for leniency in sentencing, their remedy was to argue this theory to the jury. In the absence of a valid complaint on the part of a person whose sentencing has been delayed, the trial judge could properly await the final disposition of the case before imposing sentence so that he could weigh the culpability of each defendant in light of the full development of the facts at the trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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